92-273

No. _____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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CALVIN A. ALLEN, Seaman Apprentice,
United States Navy,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**Petition for a Writ of Certiorari to the United States Court of Military Appeals**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the United States Constitution's Appointments Clause preclude Congress from granting the Judge Advocate General of the Navy the power to appoint military trial judges?

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CALVIN A. ALLEN, Seaman Apprentice,
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UNITED STATES OF AMERICA,
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**Petition for a Writ of Certiorari to the United States Court of Military Appeals**

---

## PETITION FOR A WRIT OF CERTIORARI

---

The petitioner, Calvin A. Allen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on May 15, 1992.

## OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Allen*, 34 M.J. 228 (C.M.A. 1992), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Allen*, No. 89-4043, slip op. (N.M.C.M.R. April 26, 1991), is reprinted as Appendix B.

## JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on May 15, 1992. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

## CONSTITUTIONAL PROVISION, STATUTE, AND REGULATION INVOLVED

The pertinent portion of Art. II, § 2 is set forth in Appendix C. The text of 10 U.S.C. § 826 is set forth in Appendix D. The text of Rule for Courts-Martial 801 is set forth in Appendix E.

## STATEMENT OF THE CASE

Petitioner was found guilty of one count of aggravated assault, one count of attempted rape, one count of larceny, one count of forcible sodomy, and one count of indecent assault in violation of 10 U.S.C. §§ 928, 880, 921, 925, and 934, respectively. Thereafter, the trial judge sentenced petitioner to confinement for 45 years, forfeiture of all pay and allowances, reduction to the lowest enlisted rank, and a dishonorable discharge. On appeal, in an unpublished opinion, the Navy-Marine Corps Court of Military Review reversed petitioner's conviction of attempted rape but otherwise affirmed the convictions. *United States v. Allen*, No. 89-4043, slip op. (N.M.C.M.R. April 26, 1991). Upon reassessing the sentence, the court reduced the amount of confinement to

30 years, and affirmed the remaining elements of the sentence. The Court of Military Appeals affirmed the Navy-Marine Corps Court's decision. *United States v. Allen*, 34 M.J. 228 (C.M.A. 1992).

## REASONS FOR GRANTING THE WRIT

### CONGRESS' PLACEMENT OF THE POWER TO APPOINT MILITARY TRIAL JUDGES IN THE JUDGE ADVOCATES GENERAL IS A STRUCTURAL CONSTITUTIONAL DEFECT IN THE MILITARY JUSTICE SYSTEM WHICH DEMANDS IMMEDIATE ATTENTION.

A judge presiding over a general court-martial is, for all practical purposes, the equivalent of a United States District Court judge presiding over a felony trial. A general court-martial judge has far-ranging powers, including the power to "rule on all interlocutory questions of law raised during the court-martial," to "[i]nstruct the members on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power." [1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801(a)-(b). In a case such as this, where the accused chooses a bench trial, the court-martial judge has even more discretion than the federal district court judge because the court-martial judge is not constrained by the Federal Sentencing Guidelines. *See United States v. Brown*, 28 M.J. 470, 474 n.3 (C.M.A. 1989). The trial judge in this case could have imposed any sentence ranging from no punishment to confinement for 55 years.

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[1] "A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The publishment may not exceed confinement for 30 days or a fine of $199, or both." 10 U.S.C. § 848 (1988).

Record at 358; *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.[2]

The Appointments Clause precludes Congress from placing power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. art. II, § 2, cl. 2. Congress can devolve appointment authority upon no other official. *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2642 (1991). There can be little doubt that military trial judges, who exercise extraordinary authority and discretion, are Officers of the United States. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). Yet Congress vested the power to appoint military trial judges in the Judge Advocates General. 10 U.S.C. § 826. Placing the power to appoint judges in such low-level officials[3] raises a serious question under the Appointments Clause.

As in *Freytag*, "[i]t is beyond question . . . that Congress did not intend to grant to the President the power" to appoint military trial judges. 111 S. Ct. at 2642. Nor is the Judge Advocate General of the Navy, who is a subordinate of the Secretary of the Navy, 10 U.S.C.A.

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[2] "Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized by this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment."

[3] The Judge Advocates General are not even the primary legal advisors in their respective services. Rather, "The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense." Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992) [Appendix E].

§ 5148 (West Supp. 1991), a Head of a Department. It is self-evident that the Judge Advocate General of the Navy, who is by statute an Executive Branch officer tasked with performing legal duties "under the direction of the Secretary of the Navy," *id.* at § 5148(b), (d), is not a "Court of Law." Thus, Congress gave the power to appoint military trial judges to an impermissible official.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S. Ct. at 2638. This concern is directly implicated by allowing the Judge Advocate General to appoint military trial judges. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

*Freytag*, 111 S. Ct. at 2639 (emphasis added).

The significance of the Appointments Clause defect is magnified by the fact that military trial judges serve without the protection of a fixed term of office. *See generally United States v. Graf*, 32 M.J. 809 (N.M.C.M.R. 1990), *petition granted*, 34 M.J. 169 (C.M.A. 1991). Thus, not only are military trial judges *appointed* by the Judge Advocate General, they serve at the pleasure of the Judge Advocate General, who may *remove* them from office. Giving such a low-level official the power of appointment and removal carries the risk that these powers

will be used to advance the Judge Advocate General's parochial interests.

The apopintment of military trial judges in violation of the Appointments Clause is a serious constitutional defect which the Court should address immediately. In *Freytag*, the Court indicated that "[t]he alleged defect in the appointment of the special trial judge goes to the validity of the Tax Court proceeding that is the basis for this litigation." 111 S. Ct. at 2639. This comports with the Court's earlier recognition that individuals appointed in violation of the Appointments Clause may not be involved in "the administration and enforcement of the public law[.]" *Buckley v. Valeo*, 424 U.S. at 139. Thus, until Congress places the power to appoint military trial judges in a constitutionally permissible official, every court-martial is invalid.

Finally, despite the fact that this issue was not raised below, the Court should not treat it as waived or forfeited. *See Freytag*, 111 S. Ct. at 2647 n.2 (Scalia, J., concurring). As noted in *Freytag*, the Court "has exercised its discretion to consider nonjurisdictional claims that have not been raised below." 111 S. Ct. at 2639 (citing, *inter alia*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962)). The Court emphasized, "*Glidden* expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag*, 111 S. Ct. at 2639. Due to the importance of this issue to the entire military justice system and to the rule of constitutional law, the Court should hear the Appointments Clause issue.

## CONCLUSION

The manner in which military trial judges are appointed presents a serious constitutional issue: may Congress vest the power to appoint Article I court judges

in an official who is statutorily subordinate to the Secretary of a Department? This issue strikes at the heart of the military justice system's structural integrity. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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August 13, 1992

# APPENDICES

## APPENDIX A

## U.S. COURT OF MILITARY APPEALS

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UNITED STATES,

*Appellee,*

v.

CALVIN L. ALLEN, Seaman Apprentice, U.S. Navy,

*Appellant.*

No. 67,142
NMCM 89 4043

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Argued March 5, 1992

Decided May 15, 1992

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For Appellant: *Major Richard T. McNeil, USMC* (argued); *Lieutenant David P. Sheldon, JAGC, USNR* (on brief).

For Appellee: *Lieutenant Commander J. Richard Chema, JAGC, USN* (argued); *Colonel T.G. Hess, USMC* (on brief); *Lieutenant Ralph G. Stiehm, JAGC, USNR.*

*Opinion of the Court*

WISS, Judge:

Although appellant pleaded not guilty, a general court-martial composed of a military judge alone convicted him of aggravated assault (tried as attempted murder), attempted rape, larceny, forcible sodomy, and indecent assault, in violation of Articles 128, 80, 121, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928, 880, 921, 925, ad 934, respectively. Thereafter, the military judge sentenced appellant to a dishonorable discharge,

confinement for 45 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence.

In an unpublished opinion, the Court of Military Review reversed appellant's conviction of attempted rape but otherwise affirmed the findings below. On reassessment of the sentence, the court reduced the adjudged confinement to 30 years and affirmed the remaining elements of the sentence.

On appellant's petition to this Court, *see* Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (1989), we granted review of the following two issues of law:

I

WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHEN IT APPLIED THE INEVITABLE DISCOVERY DOCTRINE TO EVIDENCE WHICH THE GOVERNMENT HAD NEVER INTRODUCED INTO EVIDENCE.

II

WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHEN IT FOUND A PREVIOUS ILLEGAL SEARCH AND SEIZURE OF APPELLANT HAD NOT TAINTED EVIDENCE SUBSEQUENTLY OBTAINED.

After a full consideration of the briefs and oral argument [1] of the parties on these issues, we affirm the decision below.

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[1] We heard oral argument in this case at the United States Naval Academy, Annapolis, Maryland, on Thursday, March 5, 1992, without objection from the parties involved. *See* Foundation of the Federal Bar Association, *Equal Justice Under Law: The Supreme Court in American Life* 15-18 (1965); *see also* D. O'Brien, *Storm Center: The Supreme Court in American Politics* 78, 135-40 (2d ed. 1990). This procedure is similar to the well-established practice

I

The following recitation of facts appears in the opinion of the Court of Military Review:

> As the victim was working alone in her office after hours, someone attacked her from behind. The assailant struck the victim numerous times on the head with an adding machine and then repeatedly slammed her head into the floor and a desk. Once the victim was unable to resist, the assailant then removed her hosiery and underwear, inserted his hand into her vagina several times and then performed cunnilingus on her. The assailant then appeared startled and got up and briefly left the room. When he returned, the victim heard "metal clanging" that she speculated was the sound of a belt buckle. She did not see her assailant's belt and had not heard this noise at any time before the assailant returned to the room. Her assailant then struck her head against the desk several more times and fled.
>
> * * * * *
>
> The assaults in question occurred on 27 December 1988. The victim's initial description of her attacker

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of the United States Court of Appeals for the Eighth Circuit which holds hearings at various law schools within its circuit. The United States Court of Military Appeals conducts a hearing such as this outside its permanent courthouse in Washington, D.C., as part of its "Project Outreach," a public awareness project which demonstrates not only the operation of a Federal appellate court but also the quality and effectiveness of the criminal justice system of our Armed Services and the Uniform Code of Military Justice (Arts. 1-146, 10 U.S.C. §§ 801-946, respectively). It is hoped that the thousands of students, service persons, military and civilian attorneys, and members of the American public who witness these hearings will realize that America is a democracy that can maintain an Armed Force instilled with the appropriate discipline to make it a world power and yet afford the members of that Armed Force a fair and impartial justice system which does provide the full protection of the Constitution of the United States and Federal law to its members.

was a black man, 5'11", 200 pounds with a slightly protruding stomach, short hair, and no glasses or facial hair. The day after her attack, the victim reviewed her initial statement given to NIS [Naval Investigative Service and made several corrections but did not change the description. Based on her initial description, NIS decided to identify, interview, fingerprint and photograph all men fitting the description.

[At the crime scene, investigators had found bloody latent finger and palm prints on a desk-top calculator and a roll of calculator paper that they reasoned were prints of the attacker.]

On 30 December, the victim told Special Agent Moran she had heard a sailor called "Weird Al" on the USS FULTON fit the general description and had also been involved in a similar assault in New London, Connecticut. NIS contacted the USS FULTON on 30 December and asked to be informed when appellant returned to the ship. Master Chief Master-at-Arms Russack instructed another sailor in his department to follow appellant around the ship, look for markings on his body, prevent appellant from destroying any clothing, and prevent appellant from leaving the ship. The assistant master-at-arms, Petty Officer DeGroat, followed appellant around the ship and noted some marks on appellant's body while watching appellant in the shower. When appellant attempted to leave the ship that Friday evening, Petty Officer DeGroat intercepted him and told appellant Master Chief Russack wanted to see him. Master Chief Russack told appellant some people wanted to talk to him. After waiting for some time, appellant said he wanted to leave and go to his civilian night job, but remained after the Master Chief said he would appreciate it if appellant would wait for the men coming to talk to him so they could get the mat-

ter cleared up. Special Agents Moran and Hajosy arrived and began asking appellant about his whereabouts the night in question. Appellant then signed a permissive search request. After the search, the agents obtained fingerprints and photographs of the appellant. The photograph showed appellant had a thick mustache. Agent Moran also noticed appellant had cuts on his elbow and finger.

Appellant remained with the Master-at-Arms and NIS agents from approximately 2130 to 2330 that evening. He never asked to leave while the NIS agents were with him. The agents did not advise appellant of his Article 31(b), UCMJ, 10 U.S.C. § 831(b), rights on 30 December because they did not specifically suspect him of committing an offense. At that time, NIS considered appellant as one of several individuals who fit the general description given by the victim. The agents said they would question and obtain fingerprints and photographs of anyone who fit the description. During the course of their investigation, NIS interviewed several hundred individuals matching the description and obtained fingerprints from a number of these individuals.

On 31 December, the morning after NIS agents contacted appellant, the victim made a change in her written statement of 28 December. Instead of describing her assailant as clean shaven, she now said she was only 50 percent sure whether or not her assailant had a mustache. NIS Agent Moran said he did not suggest anything about a mustache to the victim as she was reviewing her statement for a second time on 31 December.

On 10 January 1990 [should be 1989], Agent Moran asked appellant to come to the local hospital so NIS could check out new reports that appellant had fresh scratch wounds on his chest. Appellant co-

operated and signed a consent form. After being examined at the hospital, appelant agreed to follow Agent Moran back to the NIS office where he consented to be fingerprinted and photographed again. The NIS agents wanted to get a better quality photograph and wanted fingerprints on a standard NIS card instead of the card used from the ship's fingerprint kit on 30 December. While appellant was still at the NIS offices on 10 January, the victim was in another area of the building and immediately picked appellant out of a photographic lineup created by NIS after receiving his photograph. He then became a suspect, received Article 31(b) warnings and agreed to make a statement.

On 11 January, Mr. Finkle [a fingerprint-identification expert with the Connecticut State Police Forensic Laboratory] received the fingerprint cards from NIS and concluded that appellant's fingerprints matched the prints found on the bloody items from the crime scene. The card of fingerprints obtained on 30 December that was used at trial was just one of a set of cards Mr. Finkle received. Fingerprints taken on 10 January were attached to the palm print Mr. Finkle received. Mr. Finkle examined the fingerprint card from 30 December and concluded those prints were made by the same person who left a bloody print on the calculator paper at the crime scene. He also said the palm print of the appellant obtained on 10 January matched the bloody print left on the calculator.

Unpub. op. at 2, 4-5.

II

A number of legal issues are suggested by these facts. For instance, under all the circumstances, was appellant "seized" on December 30, within the meaning of the Fourth Amendment, when he was kept on board the USS FULTON for a period of two hours? *Compare Michi-*

*gan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988), and *United States v. Fagan*, 28 MJ 64 (CMA), *cert. denied*, 493 U.S. 823, 110 S.Ct. 83, 107 L.Ed.2d 48 (1989), *with Florida v. Bostick*, —— U.S. ——, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), and *United States v. Scott*, 22 MJ 297 (CMA 1986), *cert. denied*, 480 U.S. 931, 107 S.Ct. 1567, 94 L.Ed.2d 759 (1987). If so, was the "seizure" nonetheless lawful? *See Florida v. Bostick, supra*; *United States v. Phillips*, 30 MJ 1 (CMA 1990). If appellants was "seized" on December 30 and if that "seizure" was not lawful, were appellant's fingerprints and palm print that were taken on January 10 tainted by that earlier illegality and, thus, also not admissible? *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). This latter issue, of course, raises a host of subsidiary questions like consent and attenuation. *See Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

We conclude, however—as did the Court of Military Review—that we need not answer these questions because, in any event, evidence of appellant's fingerprints and palm print would have been inevitably discovered. *See Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); *United States v. Kozak*, 12 MJ 389 (CMA 1982). *See also United States v. Jones*, 26 MJ 353, 359 n. 9 (CMA 1988); *United States v. Roa*, 24 MJ 297, 302-03 (CMA 1987 )(Sullivan, J., concurring in the result).

As the Supreme Court held in *Nix v. Williams, supra* 467 U.S. at 444, 104 S.Ct. at 2509:

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received.

(Footnote omitted.) The Court earlier in its opinion had explained:

> The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct.

*Id.* at 443 n.4, 104 S.Ct. at 2509 n.4.

Applying the principle and the rationale of the inevitable-discovery rule to the facts of this case, we agree with the following government reasoning:

> Regardless of the legality of the 30 December fingerprinting, there is no doubt that the Government could and would have obtained another set of prints legally from appellant. Appellant fit the general description of the assailant. After the victim decided that she was uncertain whether appellant had a mustache or not, there was an even greater resemblance to the description. Even if somehow the NIS had not independently identified appellant as an individual to fingerprint, the most salient fact establishing both the inevitably and independence of the legal seizure of appellant's prints (and photograph for the victim identification), is that the victim herself provided the tip to NIS. Once it was known that an individual having the nickname "Weird Al" fit the general description of the assailant, had base access, was previously involved in some type of similar incident . . . , and was someone the victim herself felt needed to be investigated, it was a foregone conclusion that during this high profile investigation prints would be obtained.

Answer to Final Brief at 23-24 (footnotes omitted). In addition, we observe that the NIS investigation included fingerprinting of virtually all personnel who fit the victim's description of her assailant and who had base access on the night of the incident;[2] that appellant had

[2] As noted earlier, the victim's description of her assailant included the fact that the perpetrator was black and was a male. Logically, the NIS investigation focused on black men—black men who also fit the other aspects of the description. Appellant's assertion that the NIS investigation amounted to a "racially-based" drag-

fully cooperated in all aspects of the investigation and undoubtedly would have continued to cooperate in any additional requests for fingerprints; and that, under easily complied-with procedures, the NIS could have compelled appellant to produce his fingerprints, *see United States v. Fagan, supra*—if, indeed, appellant's fingerprints already were not part of his military file.

Under all these circumstances, we hold that the Court of Military Reivew correctly concluded that the Government has shown by a preponderance of the evidence that the challenged evidence would have been inevitably discovered. *See also Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).[3]

III

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

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not is as baseless as to say that it was impermissibly *gender*-based. Indeed, if law enforcement investigators did *not* limit efforts like what occurred here to potential suspects who *met* the description, appellant and others similarly situated logically could be expected to complain about *that*. It is the very purpose of investigations to *limit* the universe of potential suspects.

[3] It is appellant's *fingerprints* which are the relevant evidence in this trial, not the *vehicle* for those fingerprints. Thus, assuming any illegalty in obtaining the December 30 set of prints, the fact that that card was the *vehicle* that was admitted at trial does not legally or logically vitiate the sound application of the inevitable-discovery principle as to appellant's *fingerprints*. *Compare United States v. Cherry*, 759 F.2d 1196 (5th Cir.1985), *with Bynum v. United States*, 262 F.2d 465 (D.C.Cir.1958).

## APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria VA 22332-2400

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IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW
BEFORE

E. M. ALBERTSON
WALTER J. LANDEN, SR.
T. A. LAWRENCE

---

UNITED STATES

v.

CALVIN L. ALLEN, 226 02 5858
Seaman Apprentice (E-2), U.S. Navy

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NMCM 89 4043 Decided 26 April 1991

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Sentence adjudged 20 July 1989. Military Judge: H. W. Haldeman. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Submarine Group TWO, Naval Submarine Base New London, Groton, CT 06349-5100.

LT WADE W. PARRISH, JAGC, USNR, Appellate Defense Counsel

LT RALPH G. STIEHM, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

Appellant was convicted by the military judge alone at a general court-martial of assault with intent to com-

mit grievous bodily harm, indecent assault, sodomy, attempt to commit rape, and larceny. Appellant contested all charges and specifications, but was found guilty and received a sentence from the military judge of confinement for 45 years, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge.

This case comes to us with five assignments of error.[1] Our decision on the first and third assignments of error will resolve the substantive issues on appeal and support our review of appellant's sentence.

Appellant's first two assignments of error allege a lack of sufficient evidence to prove he attempted to rape the victim. As the victim was working alone in her office after hours, someone attacked her from behind. The assailant struck the victim numerous times on the head with an adding machine and then repeatedly slammed her head into the floor and a desk. Once the victim was unable to resist, the assailant then removed her hosiery and underwear, inserted his hand into her vagina several times then then performed cunnilingus on her. The assailant then appeared startled and got up and briefly left the room. When he returned, the victim heard

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[1] I. THE GOVERNMENT FAILED TO PRESENT LEGALLY SUFFICIENT EVIDENCE ON CHARGE I, SPECIFICATION TWO, ATTEMPTED RAPE.

II. THE GOVERNMENT FAILED TO PROVE APPELLANT GUILTY BEYOND A REASONABLE DOUBT OF CHARGE I, SPECIFICATION TWO, ATTEMPTED RAPE.

III. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN HE DENIED THE MOTION TO SUPPRESS APPELLANT'S FINGERPRINTS.

IV. THE GOVERNMENT FAILED TO PROVE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT AS TO ALL OF THE CHARGED OFFENSES.

V. A SENTENCE INCLUDING CONFINEMENT IN EXCESS OF TEN YEARS AND A DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE UNDER THE CIRCUMSTANCES OF THIS CASE.

"metal clanging" that she speculated was the sound of a belt buckle. She did not see her assailant's belt and had not heard this noise at any time before the assailant returned to the room. Her assailant then struck her head against the desk several more times and fled.

To convict someone for attempt to commit rape, the government must prove beyond a reasonable doubt that there was an overt act toward the commission of a rape that amounted to more than mere preparation, along with a concurrent specific intent to rape. *United States v. Hobbs*, 7 U.S.C.M.A. 693 23 C.M.R. 157 (1957); Part IV, Paragraph 4b, Manual for Courts-Martial (MCM), United States, 1984. Attempted rape, in particular, requires evidence beyond a reasonable doubt that the accused had the specific intent to have intercourse with the victim by force against the victim's will. *United States v. Gonzalez-Rodriguez*, 7 M.J. 633, 637 (A.C.M.R. 1979). The greater specificity of intent required for an attempt, the more unequivocal must be the acts alleged to prove the intent necessary in the attempt. *Id.* Although intent may be proven circumstantially by an accused's acts, *United States v. Garcia*, 15 M.J. 685 (A.F.C.M.R. 1983), proof of the overt acts of the accused may not, by themselves, by bootstrapped up to also prove the specific intent required to prove an attempt offense. *United States v. Polk*, 48 C.M.R. 993, 996 (A.F.C.M.R. 1974). An accused's acts may prove a general evil desire for sexual gratification without providing sufficient proof of a specific intent to have intercourse. *Id.*

In *Polk*, the accused entered the victim's bedroom while nude, lay on top of the victim and held the victim's neck and head. In *United States v. Sampson*, 7 M.J. 513 (A.C.M.R. 1979), the accused entered the victim's bedroom while nude, confronted the nude victim in her bathroom, reached for the victim, and only left when he heard the victim's husband. The courts in each case held that the accused had an evil, libidinous desire and may have

committed an overt act toward the commission of a rape, but that the acts of the accused did not exclude the reasonable possibility that he was attempting another offense. The evidence did not establish an attempt to penetrate in either case. *Cf. United States v. Dearman*, 7 M.J. 713 (A.C.M.R. 1979) (accused fondled victim, performed cunnilingus, unzipped his pants and attempted penetration).

In this case, there is no evidence that appellant did any acts indicating an intent to engage in sexual intercourse. In support of his finding on this specification, the military judge said sexual intercourse was the natural and probable purpose behind appellant's acts of attacking the victim, fondling and sodomizing her and having his belt unbuckled. The victim merely said that she heard a sound "like a belt buckle" when appellant returned to the room after going into a hallway. Also, there is no factual support for the government's contention that it is absolutely clear that appellant had undone his belt prior to getting off the victim and briefly leaving the room. The victim said she had never heard a metal sound before appellant returned from the hallway. She did not hear a metal sound when appellant got off her and walked out of the room. There is no evidence that appellant had his belt unbuckled while he was sexually assaulting the victim, or that he intentionally unbuckled his belt even if it was unbuckled. When appellant returned to the room and the victim heard metal clinging, appellant made no attempt to have intercourse. He did not resume the sexual assault, but instead spent his time physically assaulting the victim again and stealing her purse.

The status of appellant's belt buckle also does not support a finding beyond a reasonable doubt that appellant intended to have sexual intercourse with the victim. There are a number of other offenses appellant could have intended to commit with his belt unbuckled. He could have intended to assault the victim with the belt.

He could have intended merely to expose himself to he victim. He could have intended to force the victim to perform oral sex on him.

Based on the tesimony of the victim and the acts of the appellant, we are unable to concur in the military judge's finding that appellant's acts would have definitely resulted in rape if the appellant had not been startled by something and briefly left the room. Given the fact that there is no clear evidence that appellant ever attempted to disrobe and the variety of other possible offenses he could have intended to commit under these facts, we are unable to conclude that the evidence is factually sufficient to prove beyond a reasonable doubt that appellant had the specific intent to have intercourse with the victim. Article 66, Uniform Code of Military Justice.

Appellant's third assignment of error concerns the admissibility of a set of fingerprints he provided to Naval Investigative Service (NIS) agents on 30 December 1988. The assaults in question occurred on 27 December 1988. The victim's initial description of her attacker was a black man, 5'11", 200 pounds with a slightly protruding stomach, short hair, and no glasses or facial hair. The day after her attack, the victim reviewed her initial statement given to NIS and made several corrections but did not change the description. Based on her initial description, NIS decided to identify, interview, fingerprint and photograph all men fitting the description.

On 30 December, the victim told Special Agent Moran she had heard a sailor called "Weird Al" on the USS FULTON fit the general description and had also been involved in a similar assault in New London. NIS contacted the USS FULTON on 30 December and asked to be informed when appellant returned to the ship. Master Chief Master-at-Arms Russack instructed another sailor in his department to follow appellant around the ship, look for markings on his body, prevent appellant from destroying ary clothing, and prevent appellant from leav-

ing the ship. The assistant master-at-arms, Petty Officer DeGroat, followed appellant around the ship and noted some marks on appellant's body while watching appellant in the shower. When appellant attempted to leave the ship that Friday evening, Petty Officer DeGroat intercepted him and told appellant Master Chief Russack wanted to see him. Master Chief Russack told appellant some people wanted to talk to him. After waiting for some time, appellant said he wanted to leave to go to his civilian night job, but remained after the Master Chief said he would appreciate it if appellant would wait for the men coming to talk to him so they could get the matter cleared up. Special Agents Moran and Hajosy arrived and began asking appellant about his whereabouts the night in question. Appellant then signed a permissive search request. After the search, the agents obtained fingerprints and photographs of the appellant. The photograph showed appellant had a thick mustache. Agent Moran also noticed appellant had cuts on his elbow and finger.

Appellant remained with the Master-at-Arms and NIS agents from approximately 2130 to 2330 that evening. He never asked to leave while the NIS agents were with him. The agents did not advise appellant of this Article 31(b), UCMJ, rights on 30 December because they did not specifically suspect him of committing an offense. At that time, NIS considered appellant as one of several individuals who fit the general description given by the victim. The agents said they would question and obtain fingerprints and photographs of anyone who fit the description. During the course of their investigation, NIS interviewed several hundred individuals matching the description and obtained fingerprints from a number of these individuals.

On 31 December, the morning after NIS agents contacted appellant, the victim made a change in her written statement of 28 December. Instead of describing her as-

sailant as clean shaven, she now said she was only 50 percent sure whether or not her assailant had a mustache. NIS Agent Moran said he did not suggest anything about a mustache to the victim as she was reviewing her statement for a second time on 31 December.

On 10 January 1990, Agent Moran asked appellant to come to the local hospital so NIS could check out new reports that appellant had fresh scratch wounds on his chest. Appellant cooperated and signed a consent form. After being examined at the hospital, appellant agreed to follow Agent Moran back to the NIS office where he consented to be fingerprinted and photographed again. The NIS agents wanted to get a better quality photograph and wanted fingerprints on a standard NIS card instead of the card used from the ship's fingeprint kit on 30 December. While appellant was still at the NIS offices on 10 January, the victim was in another area of the building and immediately picked appellant out of photographic lineup created by NIS after receiving his photograph. He then became a suspect, received Article 31(b) warnings and agreed to make a statement.

On 11 January, Mr. Finkle received the fingerprint cards from NIS and concluded that appellant's fingerprints matched the prints found on the bloody items from the crime scene. The card of fingerprints obtained on 30 December that was used at trial was just one of a set of cards Mr. Finkle received. Fingerprints taken on 10 January were attached to the palm print Mr. Finkle received. Mr. Finkle examined the fingerprint card from 30 December and concluded those prints were made by the same person who left a bloody print on the calculator paper at the crime scene. He also said the palm print of the appellant obtained on 10 January matched the bloody print left on the calculator.

Appellant argues that the set of fingerprints obtained on 30 December and used against him at trial are fruits of an illegal seizure and should be inadmissible against

him. The events that occurred subsequent to that evening defeat any objection he may have had to the admissibility of his fingerprints.

There is no evidence that the meeting on 10 January was a result of the 30 December meeting. The 10 January meeting occurred because NIS had received a report that appellant had scratch marks on his chest. It was standard procedure in this investigation for NIS to fingerprint and photograph all men who might fit the description of the assailant given by the victim. Even if the 30 December meeting had never occurred, NIS would have asked for appellant's fingerprints and photograph on 10 January. In fact, appellant could have been required to provide his fingerprints to authorities at any reasonable time, *United States v. Fagan*, 28 M.J. 64 (C.M.A. 1989), but he agreed to follow the agents to NIS headquarters on 10 January to give them his prints.

These facts make the fingerprints admissible under the inevitable discovery rule. The purpose of the inevitable discovery rule is to prevent setting aside convictions that would have been obtained without the police misconduct in question. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). That is certainly the case here. NIS would have obtained the fingerprints regardless of the 30 December interview. As a result of its investigation of an independent report of scratch marks on the appellant, the government actually did obtain prints with the consent of appellant on 10 January. These prints were included in the packet of fingerprints received by the fingerprint expert. In addition to the prints obtained on 30 December, the government also possessed a set of fingerprints obtained with appellant's consent on 10 January. It was just by chance that the expert pulled out a fingerprint card from 30 December and used that for his comparisons instead of a card from the prints taken on 10 January. The inevitable discovery doctrine would remove any taint to the prints of appellant even if the

meeting on 30 December was an illegal seizure as appellant claims. *See United States v. Roa*, 24 M.J. 297, 303 (C.M.A. 1987) (Sullivan, J., concurring). If the prints from 30 December never existed, the government would have achieved the same result from the prints obtained on 10 January.

Because appellant's fingerprints would have been inevitably discovered, we do not need to decide if appellant was in fact illegally seized on 30 December. The fingerprint cards are admissible regardless of what happened on the ship that evening.

Based on our decision on appellant's first assignment of error, we set aside the finding of guilty to Specification 2 of Charge I and dismiss that specification. The remaining findings approved on review below are affirmed. Upon reassessment of the sentence in light of our decision here and the principles in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Cox*, 18 M.J. 72 (C.M.A. 1984); *United States v. Crowe*, 30 M.J. 1144 (A.F.C.M.R. 1990), we affirm only so much of the sentence that provides for confinement for 30 years, forfeiture of all pay and allowances, reduction in rate to pay grade E-1, and a dishonorable discharge.

E. M. ALBERTSON, Senior Judge

WALTER J. LANDEN, SR., Judge

T. A. LAWRENCE, Judge

## APPENDIX C

U.S. Const. art. II, § 2

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

## APPENDIX D

### § 826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a

judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

## APPENDIX E

Manual for Courts-Martial, United States, 1984,
Rule for Courts-Martial 801

**Rule 801. Military judge's responsibilities; other matters**

(a) *Responsibilities of military judge.* The military judge is the presiding officer in a court-martial.

The military judge shall:

(1) Determine the time and uniform for each session of a court-martial;

(2) Ensure that the dignity and decorum of the proceedings are maintained;

(3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purpose of these rules and this Manual;

(4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

(5) Instruct the members on questions of law and procedure which may arise.

(b) *Rules of court; contempt.* The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) *Obtaining evidence.* The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

(d) *Uncharged offenses.* If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial, the court-martial shall proceed with the trial of the offense charged.

(e) *Interlocutory questions and questions of law.* For purposes of this subsection "military judge" does not include the president of a special court-martial without a military judge.

(1) *Rulings by the military judge.*

(A) *Finality of rulings.* Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(B) *Changing a ruling.* The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) *Article 39(a) sessions.* When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803.

(2) *Rulings by the president of a special court-martial without a military judge.*

(A) *Questions of law.* Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) *Questions of fact.* Any ruling by the president of a special court-martial without a

military judge on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(C) *Changing a ruling.* The president of a special court-martial without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) *Presence of members.* Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) *Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member.*

(A) *Determination.* The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) *Instructions.* When a ruling by the president of a special court-martial without a military judge is subject to objection, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members to

understand the issue and the legal standards by which they will determine it if objection is made.

(C) *Voting.* When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(D) *Consultation.* The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) *Standard of proof.* Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.

(5) *Scope.* Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

(f) *Rulings on record.* All sessions involving rulings or instructions made or given by the military judge or the president of a special court-martial without a military

judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] "military judge" does not include the president of a special court-martial without a military judge.

(g) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

## APPENDIX F

[SEAL] [SEAL]

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-1000

March 3, 1992

MEMORANDUM FOR:

SECRETARIES OF THE MILITARY DEPARTMENTS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Ensuring Execution of the Laws and Effective Delivery of Legal Services

Among the chief duties of the Secretary of Defense and the Secretaries of the Military Departments is the faithful execution of the laws of the United States. Effective performance of that duty requires that the Department of Defense have a single chief legal officer and that each Military Department have a single chief legal officer. They should be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services. Section 139 of Title 10 of the United States Code provides that the General Counsel of the Department of Defense is the chief legal officer of the entire Department of Defense. As such, the General Counsel of the Department of Defense is responsible and accountable to the Secretary of Defense for and has the authority necessary to ensure uniform, proper interpretation and application of the law and delivery of legal services throughout the Department of Defense. The purpose of this memorandum is to provide similarly for a single chief legal officer for each of

the Military Departments within the Department of Defense.

Accordingly, pursuant to Title 10, including Sections 113, 3011, 5011, and 8011, and Department of Defense Directive 5105.2, this is to direct effective immediately as follows:

(1) The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense.

(2) The General Counsels of the Military Departments shall be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services within their respective departments.

(3) Civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretary of a Military Department shall be subject to the authority of the General Counsel of that Military Department with respect to the performance of those legal duties.

(4) The General Counsels of the Military Departments shall ensure that civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretaries of the Military Departments comply with applicable statutory, regulatory, and ethical standards of the legal profession in the performance of those duties.

(5) The legal opinions of the General Counsels of the Military Departments shall be the controlling legal opinions of their respective Departments.

(6) The General Counsels of the Military Departments, subject to the authority, direction and control of the Secretaries of the Military Departments, shall implement this memorandum in a manner consistent with applicable law, including Sections 806, 825, 827, 854 through 870, 873, 874, and 945 of Title 10.

Nothing in this memorandum shall be deemed to create any right in any person not otherwise prescribed by law or regulation.

/s/ D.J. Atwood

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(2)

No. 92-273

# In the Supreme Court of the United States

OCTOBER TERM, 1992

CALVIN A. ALLEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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HPP

## QUESTION PRESENTED

Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-9a, is reported at 34 M.J. 228. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 10a-18a, is not officially reported.

### JURISDICTION

The judgment of the Court of Military Appeals was entered on May 15, 1992. The petition for a writ of certiorari was filed on August 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

## STATEMENT

Petitioner, a member of the United States Navy, was convicted by a military judge of one count of attempted rape, one count of forcible sodomy, one count of assault with intent to inflict grievous bodily harm, one count of larceny, and one count of indecent assault, in violation of Articles 80, 121, 125, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 921, 925, 928, and 934, respectively. The trial judge sentenced petitioner to confinement for 45 years, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. 860, and approved the findings and sentence. The Navy-Marine Corps Court of Military Review reversed petitioner's conviction for attempted rape, but affirmed his other convictions. It reduced the confinement term of petitioner's sentence to 30 years, but affirmed the remaining aspects of petitioner's sentence. The Court of Military Appeals granted discretionary review and affirmed.

## ARGUMENT

Petitioner maintains that the military trial judge was not qualified to hold that position because he was appointed to it by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court, for several reasons.

*First*, petitioner has not properly preserved his claim for review by this Court. Petitioner did not raise this contention at or before trial and therefore has waived his claim under the rules of military procedure. See Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States—1984*, at II-109.[1] Petitioner also did not

---

[1] Rule 905(e) provides as follows:

raise this claim in the court of military review or in the Court of Military Appeals, and neither court addressed petitioner's contention. Petitioner therefore cannot raise that claim for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]."") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[2]

Relying on *Freytag* v. *Commissioner*, 111 S. Ct. 2631 (1991), petitioner asks this Court to forgive his waiver.

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> Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

[2] The Court of Military Appeals did not grant review on this question. Accordingly, it is not clear that this question is subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) and 10 U.S.C. 867(h)(1), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right to limit its decision in any case to less than all the issues urged by the accused. 10 U.S.C. 867(d). Since petitioner did not raise this issue for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issue that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

*Freytag* involved an Appointments Clause challenge to the selection of special trial judges by the chief judge of the Tax Court, a challenge that the petitioners had not raised in that court. This Court said that it had the power to excuse the petitioners' waiver, and found *Freytag* to be "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge" despite their failure to assert it in the courts below. 111 S. Ct. at 2639. Petitioner urges the Court to follow the same approach in this case.

*Freytag*, however, did not involve a rule of procedure, like Rule for Courts-Martial 905(e), requiring a defendant to raise a claim in a timely manner on pain of forfeiture. That difference is material. For the past two decades, this Court has consistently declined to review defendants' claims that have not been properly preserved under the rules of trial and appellate procedure unless the defendant can establish both "cause" and "actual prejudice" for his default. See, *e.g.*, *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murray* v. *Carrier*, 477 U.S. 478 (1986). Petitioner has made no effort to satisfy that test. In any event, petitioner has not explained why the question presented in this case is of such imperative public importance that this Court should deviate from its firmly settled practice of declining to serve as a nisi prius court. Finally, the Court of Military Appeals has recently granted discretionary review to resolve this question. See *United States* v. *Weiss*, No. 67869/MC (C.M.A. June 16, 1992). Once that court has spoken on the matter, there will be ample time to address the question presented by this petition.

*Second*, there is no conflict among the circuits on the question presented by the petition. Only two appellate courts have spoken on this subject; both courts are intermediate appellate courts in the military justice sys-

tem; and both courts rejected an Appointments Clause challenge to the composition of the courts of military review. See *United States* v. *Prive*, No. 984 (C.G.C.M.R. July 6, 1992); *United States* v. *Coffman*, No. 92-1030 (N.M.C.M.R. June 3, 1992).

*Third*, petitioner's claim lacks merit. The Appointments Clause, Art. II, § 2, Cl. 2,[3] provides that only the President (with the advice and consent of the Senate) may appoint "Officers of the United States." By contrast, Congress can vest the power to appoint "inferior Officers" "in the President alone, in the Courts of Law, or in the Heads of Departments." In petitioner's view, military trial judges are "inferior Officers," but the Judge Advocates General are neither "Courts of Law" nor "the Heads of Departments" and therefore cannot appoint military trial judges. The short answer to petitioner's argument is that because the trial judge in his case, like every other judge who presides over a general or a special court-martial, was an officer of the United States appointed by the President and confirmed by the Senate, an additional appointment pursuant to the Appointments Clause is unnecessary.

Military trial judges are part of a comprehensive system of military justice established by the Uniform Code of Military Justice. The Judge Advocates General of the

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[3] The Appointments Clause, Art. II, § 2, Cl. 2, provides as follows:

> He [the President] * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

services are primarily responsible for implementing the UCMJ.[4] In carrying out that obligation, the Judge Advocates General detail commissioned military officers to serve at almost every level of the military justice system.[5] Consistent with that scheme, Article 26(b) of the UCMJ, 10 U.S.C. 826(b), provides as follows:

> A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

The military trial judge in petitioner's case was a commissioned officer. Furthermore, each commissioned officer in the Navy and Marine Corps is appointed, at least originally, by the President with the advice and consent

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[4] The Judge Advocates General are defined as "the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation." 10 U.S.C. 801(1).

[5] See, *e.g.*, 10 U.S.C. 801(13) (specifying that all "judge advocate[s]" must be military "officer[s]" serving in the various Judge Advocate General corps or other military "officer[s]" designated as "judge advocate[s]" or "law specialist[s]"), 826 (requiring the Judge Advocates General to certify and detail "commissioned officer[s] of the armed forces" to serve as military trial judges), 827(b) (specifying that prosecution and defense counsel who are detailed to practice before courts-martial must be judge advocates, who are, by definition, commissioned military officers), 870 (providing that the Judge Advocate General shall "detail * * * commissioned officers" to serve as appellate counsel before the Courts of Military Review and the Court of Military Appeals).

of the Senate.[6] As a commissioned officer, a military trial judge may be assigned to nonjudicial duties by the Judge Advocate General, as he deems it necessary to meet the needs of the service. Under these circumstances, there is no merit to petitioner's Appointments Clause argument, because it is well settled that Congress may modify existing duties or specify additional germane duties to be performed by an officer of the United States without thereby making it necessary for the incumbent again to be nominated, confirmed, and appointed pursuant to the Appointments Clause. See *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893).

In *Shoemaker*, the complainants challenged a statute establishing a commission to oversee the development of Rock Creek Park. 147 U.S. at 284. Three commission members were appointed by the President with the advice and consent of the Senate, but two military officers (the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia) also were designated to serve on the commission. *Ibid.* Their presence was challenged on the ground that they had not been nominated to and confirmed for their new position. The Court rejected that claim, explaining that, *id.* at 301:

> [T]he two persons whose eligibility is questioned were at the time of the passage of the act * * * officers of the United States who had been theretofore appointed by the President and confirmed by the Sen-

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[6] See 10 U.S.C. 531(a) ("Original appointments [of Regular Navy and Marine Corps officers] * * * shall be made by the President, by and with the advice and consent of the Senate."), 593 (requiring Presidential appointment and Senate confirmation of military reserve officers), 624 (governing promotions of regular military officers), 5912 (governing appointments and promotions of reserve officers).

> ate[.] [W]e do not think that, because additional duties, germane to the offices already held [were added by Congress], it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

The Court ultimately held that "the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties." *Ibid.*; see also *Williams* v. *Mercer*, 783 F.2d 1488, 1515 (11th Cir.) (holding that members of the Investigating Committee of the Judicial Council of the Eleventh Circuit "were not 'appointed' by the chief judge within the meaning of the Appointments Clause * * * but rather [were] sitting federal judges already appointed by the President * * * [whose] service on [the Investigating Committee was] merely an outgrowth of their existing responsibilities"; citing *Shoemaker* for the proposition that "a statutory expansion of the functions of an existing position does not create a new office requiring re-appointment"), cert. denied, 477 U.S. 904 (1986).

Under that analysis, the assignment of any Navy or Marine Corps officer to serve a tour of duty as a military trial judge is entirely consistent with the Appointments Clause. All military officers are responsible for seeing to the discipline of the members in their command and are trained to enforce the civil and military law. Under the Uniform Code of Military Justice, commissioned officers have a special duty "to quell quarrels, frays, and disorders among persons subject to [the Code] and to apprehend persons subject to [the Code] who take part therein." Art. 7(c), UCMJ, 10 U.S.C. 807(c). Every

commanding officer is further authorized to impose certain "non-judicial punishment[s]," including arrest in quarters for no more than 30 consecutive days, instead of instituting court-martial proceedings. Art. 15, UCMJ, 10 U.S.C. 815. Every officer who convenes a general or a special court-martial assumes certain quasi-judicial duties in reviewing the sentences of those courts-martial he convenes. Art. 60, UCMJ, 10 U.S.C. 860. Finally, any commissioned officer may serve as a military trial judge if he possesses the requisite qualifications for performance of that function. Given the nature of the responsibilities inherent on becoming an officer within the armed services, the duties of a military trial judge are germane to the duties of a military officer.[7] Petitioner's

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[7] Article 26 of the UCMJ, 10 U.S.C. 826, provides in part that "a military judge *shall* be detailed to each general courts martial" (emphasis added). Although the United States Navy has elected to follow the procedures set forth under that provision for special courts-martial as well, the UCMJ provides that a special court-martial may be composed of either a military judge or a board of at least three members. Art. 16, UCMJ, 10 U.S.C. 816. Any commissioned officer on active duty is qualified to serve as a member on all courts-martial. Art. 25(a), UCMJ, 10 U.S.C. 825(a). In the absence of a military judge, it is the panel of members who are tasked with adjudicating those issues that would otherwise be handled by the military trial judge. Art. 51, UCMJ, 10 U.S.C. 851. Furthermore, a summary court-martial is composed of one commissioned officer, who need not possess the qualifications of a military judge. Art. 16(3), UCMJ, 10 U.S.C. 816(3). Thus, not only does the Code anticipate that any qualified commissioned officer may perform the functions of a military judge at some point in his military career, it also anticipates that any commissioned officer, even an officer lacking the qualifications of a military judge, may at some point be called on to sit in at a court-martial and perform a judicial function. The structure of the Code in this respect provides additional authority for the proposition that the duties of a military trial judge fall within the general duties of an officer in the armed forces.

challenge to the qualifications of the military trial judge in his case therefore lacks merit.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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CALVIN A. ALLEN, Seaman Apprentice,
United States Navy,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*

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**On Petition for a Writ of Certiorari to the United States Court of Military Appeals**

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## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

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### ARGUMENT

Respondent's Brief in Opposition notes that two Courts of Military Review have rejected the issue presented. Brief in Opposition at 4-5. Neither opinion, however, was correctly decided.

In *United States v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), the Coast Guard Court of Military Review expressly held that general court-martial judges are officers, not mere employees, of the United States. *Id.* at 572-73. The Coast Guard Court, however, held that Congress is

not bound by the Appointments Clause when exercising its Article I, Section 8, Clause 14 powers to regulate the land and naval forces. *Id.* at 576-77. This holding is inconsistent with this Court's command that "[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). Thus, *Prive* was wrongly decided.

In *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam), the Navy-Marine Corps Court of Military Review held that the method by which military trial judges are appointed satisfies the Appointments Clause because all of those judges had earlier been appointed and confirmed as military officers. *Id.* at 592. Respondent's argument concerning the merits of petitioner's position also relies on military trial judges' status as commissioned officers. Brief in Opposition at 5-10. This argument, however, misses the whole point of the Appointments Clause. While the trial judge in this case was appointed by the President *as a military officer*, he was not appointed by the President *as a judge*. Judge Haldeman had the authority to decide guilt or innocence and sentence petitioner *not* because Judge Haldeman was a military officer, but because he was filling the office of a general court-martial judge. The *independent* judicial authority which Judge Haldeman and other military trial judges possess is quite different from the structured, accountable authority which other military officers exercise.

*Coffman* relied in part on *Shoemaker v. United States*, 147 U.S. 282 (1893). *Coffman*, 35 M.J. at 592. This reliance, however, is misplaced. Judge Lamberth emphasizes, "[T]he provision challenged in *Shoemaker* added certain duties to two *offices*; it did not confer additional responsibilities on any particular *officer*." *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Super-*

*vision*, 732 F. Supp. 1183, 1192 (D.D.C. 1990). *Shoemaker* is entirely irrelevant to the question of how military trial judges are appointed because Congress did not provide that service as a judge is an additional duty of some other *office*. A general court-martial judgeship is not an appurtenance of another position. Rather, it is an office unto itself. Unlike the two military officers at issue in *Shoemaker*, military trial judges do not serve *ex officio*. Thus, *Shoemaker* does not resolve the Appointments Clause issue.

## CONCLUSION

Because the petition presents an unresolved constitutional question which affects every case tried by a court-martial, this Honorable Court should issue a writ of certiorari.

Respectfully submitted,

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